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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	PP Docket No. 96-11
Improving Commission Processes	)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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March 15, 1996

TABLE OF CONTENTS

Page

SUMMARY

In response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("Inquiry") requesting comments on how to improve not only its own processes but also the processes of its bureaus, U S WEST Communications, Inc. ("U S WEST") herein responds to that Inquiry.

With the passage of the Telecommunications Act of 1996, competition will begin to drive the industry in all of its various facets. The Commission and its bureaus will need to adopt a new regulatory philosophy which makes it easier to eliminate regulations after their usefulness has expired. Delays in the application for review process is one of the most onerous processes needing to be revised. The study area waiver process is another candidate for immediate consideration. Most significantly, burdensome regulations must be cast in terms which permits their easy elimination.

Existing rules need to be re-addressed and deleted when their existence can no longer bear the scrutiny of the new statute. Policies currently in place will need to fall by the wayside to be replaced by policies fashioned in a timely manner which the Commission will be able to defend in order to carry out its mandate.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	PP Docket No. 96-17
Improving Commission Processes	)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby files these comments on the Notice of Inquiry in the above-captioned docket.[1]

In the Notice, the Federal Communications Commission ("Commission") seeks comments on ways it can improve its processes. The Notice follows requirements imposed by the President's Regulatory Reform Initiative as well as the Commission's overall public interest mandate.[2] These comments address issues pertinent to the Commission's Common Carrier Bureau ("Bureau").[3]

I. A NEW REGULATORY PHILOSOPHY IS NECESSARY

With all due respect, the processes at the Bureau can be, and often are, excruciatingly slow. The most mundane and ministerial task can take well over a year or more. At the Bureau, where U S WEST is regulated as a dominant common

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[1] In the Matter Of Improving Commission Processes, PP Docket No. 96-17, Notice of Inquiry, FCC 96-50, rel. Feb. 14, 1996 ("Notice").

[2] See Executive Office of the President, Office of Management and Budget, Memorandum for Head of Executive Departments and Establishments (1993); Office of the Vice President, Accompanying Report of the National Performance Review: Improving Regulatory Systems (1993).

[3] Notice ¶¶ 21-31.

carrier, these delays can have a devastating impact on both U S WEST and its customers, especially when extreme delays are occasioned by competitors seeking to create such delay to further their own competitive interests. As the marketplace grows more and more competitive, the harmful impact of delay at the Bureau will dramatically increase if processes cannot be accelerated dramatically. In a competitive (or imminently competitive) marketplace, whenever competitors can use the Commission's processes to delay introduction of U S WEST products, disrupt pricing of U S WEST services, and otherwise impose artificial regulatory barriers between U S WEST and its customers, the public interest is particularly ill-served. Moreover, particularly when competitors are given the strong signal that delaying tactics at the Commission will be successful, the incentive to seek to utilize the Commission's processes to game the competitive marketplace via Commission inaction will increase as well. Thus, the instant Notice is especially timely.

However, the Notice seems to assume that extreme delays, when they occur, are the result of process breakdowns within the Commission. U S WEST does not have significant insight into the internal workings of the Commission, but, as a general rule, the staff of the Bureau appears competent, dedicated, and professional. The problem lies not so much in the manner in which the Bureau's staff handles issues, applications, and disputes, but rather with the matters the staff is called upon to address and the manner in which analysis is directed to proceed. The Commission simply spends an inordinate amount of time micro-regulating local exchange carriers ("LEC") in a market where such regulation is no

longer necessary. Examples are readily available: 1) the failure to adopt true price cap regulation for LECs, insisting instead on a complex and unnecessary "sharing" mechanism tied back to inefficient rate of return regulation;[4] 2) the insistence that new LEC services be "cost supported," even though such cost support ought to be irrelevant in a price cap environment;[5] 3) the insistence that LEC "video dialtone" providers were "dominant" carriers even though they entered a marketplace with a zero market share against entrenched monopolists;[6] and 4) the failure to even consider contract tariffs for LECs in serving their large customers,[7] in addition to various other efforts to micro-regulate LEC operations. The regulatory philosophy which results in this type of micro-regulation, not the processes through which the micro-regulation is carried out, is the root of the problem the Notice seeks to address. Process changes, while nice, simply do not go to the core kinds of reforms which are really necessary if the Commission is to carry out its statutory mandate.

Particularly with the advent of the new Telecommunications Act,[8] it is incumbent on the Commission to completely revisit its philosophy of regulation.

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[4] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786, 6801-06 ¶¶ 120-163 (1990), modified on recon., 6 FCC Rcd. 2637 (1991), aff'd sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[5] Id. at 6825 ¶¶ 315-321.

[6] In the Matter of Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd. 11098 (1995), pet. for recon. pending.

[7] In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II, Third Report and Order, 9 FCC Rcd. 2718, 2731 ¶ 63 (1994).

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act").

The Commission must actively seek out opportunities to deregulate and streamline its regulatory requirements, using as a guideline the assumption that a regulatory burden is not necessary (even if it has been in place for a long time) unless it is demonstrably serving an important public purpose. This approach should be attitudinal in nature -- in contrast to today's mindset, which assumes that every incumbent regulation is beneficial unless it is demonstrated otherwise. The process of eliminating unnecessary regulations and regulatory burdens should likewise be streamlined, so that unnecessary regulations can be eliminated on a timely basis (and the process of eliminating an extraneous regulation does not become as arduous and unproductive as the burden which the regulation imposed in the first place). If the Commission is able to adjust its regulatory approach along minimalist lines, it will then be able to dedicate its best resources to the truly pressing problems entrusted to its care -- and deal with such issues in a more timely manner and on a more comprehensive basis, as well. Some specific suggestions are detailed below.

II. A PRESUMPTION THAT EXISTING RULES ARE UNNECESSARY UNLESS DEMONSTRATED OTHERWISE

One legal obstacle the Commission faces in reforming its rules to meet today's competitive challenges arises from the legal principle that it takes the same type of record to support the elimination of a burdensome rule as it took to enact it in the first place.[9] In fact, it has now been ten years since the Commission

[9] Vt. Yankee Nuclear Power v. Natural Res. D.C., 98 S. Ct. 1197 (1978) ("Yankee Nuclear"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 103 S. Ct. 2856 (1983).

concluded (quite correctly) in the Computer III docket that the Computer II subsidiary rules were anticompetitive and unnecessary,[10] yet the opponents of competition in the enhanced services markets have been able to keep this decision unresolved (and to delay it significantly) via court challenges premised entirely on the notion that the Commission had to sustain a heavy burden of proof in order to eliminate useless regulations. (The opponents of the Computer III policies did not, of course, concede that the policies were useless.)[11] However, as the Computer III fiasco points out, any policy or practice which is based on the assumption that it is an easy matter to abrogate a bad rule is very likely to encounter some unpleasant surprises. Yet, there are several steps the Commission can take to avoid the possibility that regulations adopted on an interim basis (as were the Computer II rules as applied to the divested Bell Operating Companies ("BOC"))[12] will become

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[10] In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 FCC 2d 958, 1007-12 ¶¶ 88-99 (1986) ("Phase I Order"), on recon., 2 FCC Rcd. 3035 (1987) ("Phase I Reconsideration Order"), on further recon., 3 FCC Rcd. 1135 (1988), second further recon., 4 FCC Rcd. 5927 (1989), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[11] See discussions by the Ninth Circuit Court of Appeals in which it generally describes the Commission's analysis of the costs and benefits of structural separation within the context of the positions of the various parties below (including the opponents of competition) and the Commission's alleged inability to satisfy the heavy burden of proof to eliminate the pertinent regulations. California v. FCC, 905 F.2d at 1230-39; California v. FCC, 39 F.2d 919, 927-30 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995).

[12] Policies and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order, 95 FCC 2d 1117, 1120-21 ¶ 4, 1140 ¶ 61, 1150 ¶ 80 (1983), aff'd sub nom. Illinois Bell v. FCC, 740 F.2d 465 (7th Cir. 1984), recon. denied, 56 Rad. Reg. 2d (P&F) 581 (1984), aff'd sub nom. NATA v. FCC, 772 F.2d 1282 (7th Cir. 1985).

cast in stone -- in a manner in which the Commission will be unable to expunge an antiquated rule which has outlived its usefulness.

First, the Commission can establish a presumption that existing rules (or new rules upon enactment) need to be revisited at regular intervals. During such review, any party seeking to retain the existing rule would bear the burden of proving that the rule was still necessary and in the public interest. The Commission could also burden the proponents of retention with proving the necessity of continuing a burdensome regulation. This could be done in the notice of proposed rulemaking proposing to eliminate the rule. In the absence of proof of the continued necessity for the regulation, the Commission could simply delete the unnecessary rule. This approach to examining the necessity of retaining existing regulations would not traduce the Yankee Nuclear decision of the Supreme Court -- reasoned decision-making principles would still be adhered to -- only the Commission's own internal processes would have been modified, a matter traditionally left almost entirely to the Commission's discretion.[13] Stated simply, the Commission could modify its view of its own regulations, especially those whose usefulness is likely to change as competition grows, and assume that rules will become unnecessary unless demonstrated otherwise. This shift in emphasis will make it considerably easier to eliminate regulations once they have become unnecessary -- without compromising the Commission's ability to continue the regulation under scrutiny if the record indicates that it should be retained.

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[13] Yankee Nuclear.

Second, in writing its orders, the Commission should not shrink from conceding that a prior policy might have been less than optimal, even when adopted. Efforts to avoid criticizing prior Commission analyses when adopting a new approach to a problem can entangle the Commission in a web of reasoned decision-making problems because these efforts often leave the Commission with very little by way of explanation as to why the prior rule was abandoned. The Computer III difficulties in court to a large extent stemmed from this simple failure to admit that Computer II was a bad idea -- at least as applied to the divested BOCs -- and the Commission's concomitant efforts to pretend that the Computer III rules did not represent a departure from earlier rules. A simple concession that a new approach is being adopted to replace an old approach can go far toward formulating deregulatory policies and principles which are both timely and defensible (and, accordingly, more suited to carrying out the Commission's mandate).

Third, the Commission should consider an audit of its processes (and existing rules) by an outside entity to determine which rules and policies in effect are still effective and necessary. A fresh look at the more burdensome of the Commission's rules by a disinterested party could reveal some unanticipated avenues for improvement. We do not suggest that this audit be used as a substitute for rulemaking (which would probably be unlawful). Instead, the audit should be utilized to identify rules and processes which are candidates for a rulemaking which would formally examine the continued necessity for the rule on a proper record.

III. FOCUS ON APPLICATIONS FOR REVIEW.

One category of procedural delay which can be extremely costly from a public interest perspective arises out of the application for review process.[14] Generally, the processing of an application for review is extremely time consuming. One good example is the Commission's March 7, 1996, action on a June 3, 1992, application for review of a Bureau decision on rate base inclusion of certain post employment benefits.[15] While this four-year delay is an extreme example, lengthy delays in processing and deciding applications for review are common -- often on important issues. U S WEST's application for review of an important Bureau decision refusing to permit U S WEST to modify its price cap indices to conform to a complaint settlement has been pending for well over a year.[16] These delays are particularly harmful because, during the entire review process, the Bureau's decision stands and must be complied with. In the case of a rejected tariff, this means that protracted review can actually countermand the Telecommunications Act by permitting an unlawful rejection to extend far beyond the statutory five-month suspension period -

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[14] 47 CFR § 1.115.

[15] In the Matters of Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32, Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base, AAD 92-65, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 96-63, rel. Mar. 7, 1996.

[16] Application for Review filed by U S WEST on Dec. 23, 1994. The petition which the Bureau had denied was filed yet another year earlier on Nov. 5, 1993. Another U S WEST Application for Review of a Bureau Order rejecting a U S WEST tariff has been pending since Dec. 29, 1994. In the Matter of US West Communications Tariff FCC No. 1, Order, 9 FCC Rcd. 7834 (1994) ("EPP Tariff Order").

- potentially depriving customers of service for years.[17] Moreover, judicial review of the Bureau's decision is precluded during the review period in the absence of judicial mandamus. When the Commission chooses to act via delegated authority, it is imperative that the process for full review by the Commission of a Bureau decision be expedited so that disputed issues can be settled quickly and finally -- without the interminable delays which often accompany applications for review.

IV. PROTECTIONS AGAINST FRIVOLOUS FILINGS SHOULD BE IMPLEMENTED AND ENFORCED

Unlike judicial bodies, the Commission is at times extremely lax in requiring compliance with its procedural rules. For example, in the multitude of proceedings involving video dialtone applications, filings which were obviously intended solely for the purpose of obstructing competition were not only entertained time and time again, but the filing entities were at times excused from complying with even the most rudimentary Commission procedural rules.[18] As a result of extreme delays in processing video dialtone applications, video dialtone as a concept is practically moribund, and Congress has specifically vacated the Commission's video dialtone

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[17] As is the case in U S WEST's EPP Tariff rejected more than a year ago.

[18] For example, the National Cable Television Association, Inc. ("NCTA") filed a Petition to Reject or, in the Alternative, to Suspend and Investigate U S WEST's Transmittal No. 657 regarding its basic video dialtone market trial tariff for Omaha, Nebraska. Although the Commission required "[p]arties [to] hand serve US West with a copy of their comments or serve US West by facsimile" (Public Notice, US WEST Refiled Tariff Introducing Basic Video Dialtone Market Trial in Omaha, and Files Request for Special Permission to Waive Section 61.49 of the Commission's Rules, 10 FCC Rcd. 10577 (1995)), NCTA not only failed to hand serve (or serve via facsimile) U S WEST, it neglected to serve U S WEST altogether. See In the Matter of US West Communications, Inc. Tariff FCC No. 5, Market Trial of Basic Video Dialtone Service in Omaha, Nebraska, Order, 10 FCC Rcd. 12184 n.2 (1995).

rules.[19] As the market becomes more competitive, the temptation to abuse the Commission's processes to impede competition will no doubt grow exponentially, especially if the Commission continues to accept and give significant credence to absolutely anything filed with it. The Commission must establish and follow filing and relevancy rules which ensure, to the extent possible, that frivolous and anticompetitive filings are not filed.

V. APPROVAL OF EXCHANGE SALES CAN BE EXPEDITED THROUGH SIMPLE PROCESS MODIFICATION

An process in dire need of evaluation is the Bureau's consideration of Part 36 waivers filed in conjunction with the sale of local telephone exchanges, or parts of exchanges, from one LEC to another. Competitive entry into the local exchange market is forcing LECs to carefully evaluate how to most efficiently provide local exchange services to their customers. Sometimes the outcome of this evaluation is the recognition that another LEC is in a better position to timely provide advanced telecommunications services to some of its customers. Because the sale of an exchange requires the modification of the selling and purchasing LECs' study areas, LECs are, among other things, required to secure a waiver of the Commission's frozen study area rule.[20]

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[19] Telecommunications Act at Stat. 121-24 § 573.

[20] In the Matter of MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order, 57 Rad. Reg. 2d (P&F) 267, 290 ¶ 65 (1984). See 47 CFR Part 36, Appendix-Glossary ("Study area boundaries shall be frozen as they are on November 15, 1984.").

Even though safeguards are in place that minimize the impacts that such sales can have on the Universal Service Fund,[21] and the states in which the affected customers reside must evidence that they oppose neither the sale nor the Commission granting the study area waiver, it still takes an inordinate amount of time for the study area waiver request to be acted upon. Since the Bureau has decided in excess of 35 such waiver requests since 1993, and the requests have become a fairly routine matter (with novel policy issues arising in very few cases at this point), there is an opportunity for the Bureau to act more expeditiously on these applications simply through more efficient resource allocation and processing procedures.

One of the truly unfortunate consequences of extended delays in Bureau action on these waivers is that customers are deprived of the benefits that often serve as the basis for state public service commission approval of a sale. U S WEST urges the Bureau to streamline the waiver review process. Uncontested waiver requests should be acted upon within 15 days of the date comments and oppositions are due. Contested waiver requests should be acted upon within 30 days of the due

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[21] In the Matter of US West Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules and Eagle Telecommunications, Inc., Petition for Waiver of Section 61.41(c) of the Commission's Rules, Memorandum Opinion and Order, 10 FCC Rcd. 1771, 1774 ¶17 (1995) ("We shall apply the 'one percent' guideline for USF impact on a prospective basis only. Study area waiver requests filed after the release date of this order shall be subject to the condition that the transfer at issue and any other transfers involving either carrier, as a purchaser or seller, may not cause a shift in USF assistance in an amount equal to or greater than one percent of the total USF for the year in which the waiver request is submitted[.]").

date for reply comments. A study area waiver request should be deemed approved if not acted upon by the Bureau within these time frames.

VI. CONCLUSION

There are undoubtedly more methods for attacking the problem which we perceive goes to the heart of the Commission's ability to regulate in the public interest in this time of turmoil and growing competition -- the Commission's difficulty in eliminating unnecessary and costly regulation on a timely basis. However, we submit that it is extremely important that the Commission address this issue in the very near future, and adopt some means of dealing with the problem.

Respectfully submitted,

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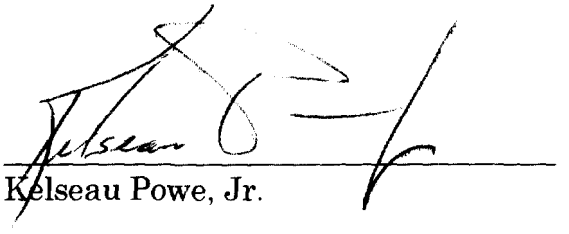
March 15, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 15th day of March, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served via hand-delivery upon the persons listed on the attached service list.



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(PP9617.KK/BM/lh)
Last Update: 3/14/96